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VIA ELECTRONIC FILING

The Honorable Jocelyn Boyd
Chief Clerk / Executive Director
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

Re: Public Service Commission Review of South Carolina Code of Regulations Chapter 103 Pursuant to S.C. Code Ann. Section 1-23-120(J)

Docket No. 2020-247-A

Reply Comments to Comments Filed Regarding Commission's Regulations on Practice and Procedure, S.C. Code Ann. Regs. 103-800, *et seq.*

Dear Ms. Boyd:

I am filing this letter on behalf of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (together, the "Companies") in reply to comments filed by other parties in the above-referenced docket as related to the review of the Commission's regulations on Practice and Procedure, S.C. Code Ann. Regs. 103-800, *et seq.* The Companies previously filed comments on these regulations in this docket on February 9, 2021. Comments were also filed by the Department of Consumer Affairs ("Consumer Advocate"), Dominion Energy South Carolina, Inc. ("Dominion"), and Charlie Terreni. The South Carolina Office of Regulatory Staff ("ORS") filed reply comments on February 17, 2020.

In its comments, the Consumer Advocate offers a set of recommendations that appear to be limited to general rate case applications, some of which the Companies find problematic, as explained below.

COMMENTS OF THE CONSUMER ADVOCATE

- The Consumer Advocate recommends that utilities file their direct testimony at the same time as their application. The Companies note this is frequently their practice for rate case applications and the Companies believe that

process has worked well in DEC/DEP dockets. However, the Companies also note that non-rate dockets, like the IRPs, are different. For example, the IRPs are the product of many multiple interdependent analyses. It is not practical to draft testimony until an IRP is complete and filed. Act 62 gives plenty of time for discovery and testimony, and the Companies note for IRPs the Commission should allow for testimony to be filed after the IRPs. The Companies believe the 60-day time length used in the DEC/DEP IRPs is appropriate, especially since discovery is conducted and answered from the time the IRPs are filed.

- The Consumer Advocate recommends that utilities submit with their rate case applications all supporting documents, including studies, models, workpapers, spreadsheets, tables, formulas, and data that support the utility's requests. This recommendation is problematic for several reasons. First, in large cases, these supporting materials are often not finalized until the filing is ready to be made, meaning that these materials would not be "ready to file" along with the application. Larger rate case proceedings can have a dozen or so witnesses and—as a matter of workflow—all of the underlying files are simply not ready to be produced the moment an application is filed. However, understanding the parties' needs for the information, the Companies expect that this type of information could be provided to parties who intend to file a petition to intervene as quickly as two weeks after filing the application. Second, as with any civil or administrative matter, this is the type of information that is appropriately requested and provided in discovery or addressed in a scheduling order. To this point, the workpapers underlying rate case applications often contain proprietary business data, so filing this information publicly would be problematic. As Mr. Terreni points out in his comments filed on February 15, 2021, this is the type of information that would be more appropriately provided "through early discovery requests, which a utility can answer with appropriate safeguards." Finally, the Commission's Docket Management System does not accept the native formulas requested by the Consumer Advocate, which is also further reason to provide that type of information in discovery or to work out the timing of the production of such materials in a scheduling order.

- The Consumer Advocate recommends that utilities' rate case applications and attendant schedules be uniformly formatted. The Companies disagree with this recommendation. First, the burden is on utilities to establish their case; utilities should therefore be permitted to file their applications in a way that makes sense on a utility-specific basis and based upon the issues in each case. Further, utilities have vastly different ways of keeping their business records and related schedules, which support the application, so uniform

formatting would not be practicable from a business operations perspective. However, if the Commission wishes to promulgate regulations regarding minimum filing requirements to ease the burden on all parties, the Companies would be happy to participate in such a rulemaking. The Companies are also willing, as the Consumer Advocate suggests, to provide a summary of filed applications that could be included in the Commission's Notice of Filing, or to provide a proposed notice that includes a summary along with its application.

- The Consumer Advocate recommends that all pleadings and testimony be filed in a word-searchable format. The Companies support this recommendation and agree with the Consumer Advocate that this recommendation could aid the parties to a docket and the Commission in their review of filed materials.

- The Consumer Advocate offers a few recommendations as to discovery.

    - First, the Consumer Advocate recommends that the Commission permit a higher number of interrogatories and requests for production, which the Companies do not oppose, particularly in rate cases. The Companies routinely answer thousands of data requests in rate cases.

    - The Companies strongly oppose the Consumer Advocate's recommendation that the time for responding to discovery be shortened. The South Carolina Rules of Civil Procedure provide that parties' responses to discovery are due 30 days after service, and also that responses are not due until 45 days after service of the complaint. SCRCP 33, 34. The Commission's regulations currently require that parties respond to discovery within 20 days. In most cases, the full 20 days is required to ensure that the utility has identified all responsive materials and sufficiently responded to the request for information. In certain narrow circumstances where the scope of discovery is limited—for example, discovery propounded on matters raised in direct, rebuttal, or surrebuttal testimony—the Companies could agree to providing responses on a shorter timeframe and this is the type of matter that could be ideally addressed in scheduling and procedural orders issued after consultation with the parties at the outset of a case. The Companies believe that would be a productive procedural step to establish in major dockets before the Commission, and the Companies note that DEC/DEP have had a productive history of finding consensus on scheduling issues in that context. Outside of this narrow context,

however, further shortening the 20-day response period would be impracticable and unreasonable.

- The Companies also oppose the Consumer Advocate's recommendation that the Commission's regulations be revised to require that discovery responses be provided to all parties to a proceeding. The Companies don't necessarily oppose this request, but note it is unnecessary. Any party to a proceeding has the ability to request in discovery the responses to other parties' discovery requests. Requiring that responses be automatically served on parties that haven't requested them would unnecessarily burden and complicate the discovery process. Further, serving discovery responses on parties who did not request the information would, in many cases, require the negotiation and execution of non-disclosure agreements. This recommendation could result in an unhelpful and burdensome requirement.

COMMENTS OF THE ORS

In its reply comments, the ORS states that the Companies recommended "that the Commission discontinue the practice of allowing parties to pre-file surrebuttal testimony." That is not entirely accurate. The Companies recommended that surrebuttal testimony no longer be "a standard practice" or that it be permitted automatically as a matter of right. As explained in the Companies' comments, the case law in South Carolina indicates that surrebuttal testimony is appropriate only when the party with the burden of proof raises new matter in its rebuttal testimony. *See State v. Watson*, 353 S.C. 620, 632, 597 S.E.2d 148, 150 (Ct. App. 2003); *U.S. v. Barnette*, 211 F.3d 803, 821 (4th Cir. 2000) ("Surrebuttal evidence is admissible to respond to any new matter brought up on rebuttal."). Other case law specific to practice before the Commission requires that utilities be given "a meaningful opportunity to rebut the evidence presented in opposition to its proposed rates," which is antagonistic to other parties filing surrebuttal testimony as a matter of right. *Utils. Serv. of S.C., Inc. v. S.C. Office of Regulatory Staff,* 392 S.C. 96, 107, 708 S.E.2d 755, 761 (2011) (citing S.C. Code Ann. Regs. 103–845(C)).

In cases where new matters are raised on rebuttal or where a "utility adjusted its application"—as referenced in the ORS letter—after other parties' direct testimony has been filed, the Companies believe that additional direct testimony addressing the new issue could be appropriate, and that if such new information is raised in rebuttal, then surrebuttal testimony could be appropriate. But both of these paths

would and should be tailored in scope to whatever is new information. But parties should not be permitted to use surrebuttal testimony simply to recapitulate prior points or to introduce new material which should have been included in direct testimony. This is particularly so in cases where the procedural schedule dictates that surrebuttal testimony be filed so close in time to the hearing that the party with the burden of proof is unable to file motions related to the surrebuttal testimony or to conduct discovery to help inform responsive testimony to new information or develop cross examination, or to even have a chance to confer with meaningful time to prepare for hearing. Surrebuttal testimony—consistent with the case law cited above—should only be permitted "to respond to [] new matter brought up on rebuttal," not exercised as a matter of right to re-raise prior points or introduce new matter.

Further, the Companies do not oppose the filing of surrebuttal testimony to respond to new issues or new evidence, particularly where there is sufficient time for the party with the burden of proof to challenge the contents of the surrebuttal testimony or to conduct discovery as related to it—this is true whether the proponent of the case is a utility or another party. If the Commission determines, however, that surrebuttal should remain a standard practice, these issues should be taken into consideration when procedural schedules are established. In other words, additional time should be built into the schedule between when surrebuttal testimony is due to be filed and when the hearing takes place.

ORS also asserts that the change contemplated by the Companies—i.e., from surrebuttal testimony being standard practice to only being permitted when the party with the burden of proof introduces new matter in rebuttal testimony—would "give utilities three bites of the apple (application, direct, rebuttal) while limiting ORS and other intervenors to just one opportunity to present evidence." This is not so in cases where the utility—as the Companies have done—files direct testimony along with their application, after which the utility only has an opportunity to file rebuttal testimony. And, as discussed at length, were the utility to raise new matter in its rebuttal testimony, surrebuttal could be appropriately permitted for the limited purpose of responding to that new matter—but that should be the scope understood by all the parties.

Finally, South Carolina appears to be the exception rather than the rule when it comes to permitting surrebuttal testimony as a matter of right. The Companies' understanding of the role of surrebuttal testimony appears to be supported by the rules of utilities commissions in nearby states:

- Arkansas Rule 4.08(C)(3): "The Party bearing the burden of proof shall have the right to file the final prepared testimony in any proceeding."
- Florida: *See, e.g.*, Order No. 090172-EI, 2009 WL 2139103, at *2 (July 13, 2009) (denying motion for leave to file surrebuttal testimony because such would "deprive [the applicant] the ability to respond to [the intervenor's] new assertions" and because it would "preclude [the applicant] from conducting meaningful discovery"); Order Denying Motion for Leave to File Surrebuttal Testimony, Order No. 991534-TP, 2000 WL 897727, at *1 (June 13, 2000) (denying motion for leave to file surrebuttal testimony because the rebuttal testimony "does not appear to introduce any new issues").
- Georgia Public Service Commission, Rate Case Landing Page, *available at* http://www.psc.state.ga.us/cases/deciding_a_rate_case.asp (stating that the utility presents its case, intervenors present their cases, and the utility presents its rebuttal case).
- Mississippi Public Service Commission Rule 15.106(2)(c), *available at* https://www.psc.ms.gov/sites/default/files/Procedural%20Rules%20Updated%2001-31-2021%20replacing%20Rule%204%20and%2021.pdf: "The party with the burden of proof may rebut evidence presented by opposing parties after all parties have presented their direct cases. Rebuttal may be afforded other parties at the Commission's discretion, provided that the party with the burden of proof shall be entitled to make the closing presentation.").
- North Carolina Utilities Commission Rule R1-21(e), *available at* https://www.ncuc.net/ncrules/Chapter01.pdf, providing that direct testimony is filed by the party with the burden of proof, direct testimony is then filed by other parties, and rebuttal testimony is filed by the party with the burden of proof.

The rules applicable in this sampling of states is consistent with the case law in South Carolina that recognizes a limited role for surrebuttal testimony, as well as the right of the party with the burden of proof to "close his case." The Companies would also note that the amount of time provided for rate cases is also comparable to that of nearby states. In North Carolina, for example, the utilities commission is required to conduct a hearing within a six-month timeframe. N.C.G.S. § 62-81(a), (b). Similarly in Georgia, the Commission must make a decision on a rate application "within six months of the original filing date or the utility is legally entitled to 100 per cent of its request, under bond and subject to refund." Georgia Public Service Commission, Rate Case Landing Page, *available at* http://www.psc.state.ga.us/cases/deciding_a_rate_case.asp.

The Companies do not oppose the recommendations proffered by Dominion or Mr. Terreni in their pre-filed comments.

The Companies hope these reply comments provide additional perspective to the Commission as it considers the regulations under review. Thank you for your consideration of these reply comments.

Kind regards,

Sam Wellborn

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cc: David Butler, Chief Hearing Officer (via email)
Parties of Record (via email)
Heather Shirley Smith, Deputy General Counsel (via email)
Katie M. Brown, Counsel (via email)